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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 ARISHA BYARS, individually and on
behalf of all others similarly situated,

12 Plaintiffs,

13 vs.

14 RITE AID CORP., a Delaware
corporation; and DOES 1 – 25, inclusive,

15 Defendants.

Case No. 5:22-cv-01377-SSS-KK
Judge: Hon. Sunshine S. Sykes

16 **RESPONSE TO ORDER NOTIFYING
PLAINTIFF OF THE COURT'S
EXPECTATIONS FOR DISMISSAL
AND NOTICE OF DISMISSAL WITH
PREJUDICE PURSUANT TO
FEDERAL RULE OF CIVIL
PROCEDURE 41(a)(1)(A)(i)**

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18 Filed: August 4, 2022
Trial date: Not assigned

1 TO THE COURT, CLERK AND ALL PARTIES OF RECORD, please take
 2 notice that Plaintiff Arisha Byars (“Plaintiff”), respectfully requests dismissal of the
 3 instant action pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure
 4 *with prejudice* as to the Plaintiff’s individual claims, and *without prejudice* as to the
 5 putative class. There has been no responsive pleading or motion filed and no class has
 6 been certified, and there is no settlement or concession of class interests in order to
 7 resolve Plaintiff’s individual claims.

8 On October 14, 2022, Plaintiff submitted a Notice of Settlement (“Notice”) [Dkt.
 9 13]. On October 17, 2022, the Court ordered Plaintiff to provide information sufficient
 10 to address the factors in *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401 (9th Cir.
 11 1989). [Dkt. 14]. Plaintiff hereby responds to order.

12 **1. The *Diaz* factors do not apply to the facts of this case, but even if they did,
 13 dismissal is proper.**

14 In 1989, the Ninth Circuit held in *Diaz* that Rule 23(e) applies prior to class
 15 certification. 876 F.2d at 1408. At that time, Rule 23 provided that “[a] class action
 16 shall not be dismissed or compromised without the approval of the court . . .” Fed. R.
 17 Civ. P. 23(e) (as amended Mar. 2, 1987, eff. Aug. 1, 1987). Under *Diaz*, the district
 18 court evaluating dismissal is to “inquire into possible prejudice from (1) class members’
 19 possible reliance on the filing of the action if they are likely to know of it either because
 20 of publicity or other circumstances, (2) lack of adequate time for class members to file
 21 other actions, because of a rapidly approaching statute of limitations, (3) any settlement
 22 or concession of class interests made by the class representative or counsel in order to
 23 further their own interests.” 876 F.2d at 1408 (citations omitted).

24 Notably, *Diaz* was decided prior to amendments to Rule 23(e), which clarified
 25 that Rule 23(e) applies to certified classes or settlement classes. Specifically, Rule
 26 23(e) now provides that “[t]he claims, issues, or defenses of a *certified class*—or a *class*
 27 *proposed to be certified for purposes of settlement*” may be settled or voluntarily
 28 dismissed “only with the court’s approval.” Fed. R. Civ. P. 23(e) (emphasis added); *see*

1 *also Lee v. CVS Pharmacy, Inc.*, No. 3:20-cv-01923-BEN-DEB, 2021 WL 308283, at
 2 *2 (S.D. Cal. Jan. 28, 2021) (acknowledging that “in 2003, the Congress revised Rule
 3 23 to make clear that court approval is only required in a putative class action where the
 4 plaintiff seeks to approve a settlement of both individual and class claims”); 7B Charles
 5 Alan Wright & Arthur R. Miller, Fed. Prac. & Proc., *Settlement, Voluntary Dismissal,*
 6 *or Compromise of Class Actions* § 1797 (3d ed. 2021) (“settlements or voluntary
 7 dismissals that occur before class certification are outside the scope of subdivision
 8 (e)”). Accordingly, because no class has been certified and there is no settlement of any
 9 kind in this action, Rule 23(e) does not apply. *See* Fed. R. Civ. P. 23(e).

10 Nevertheless, even if the Court were to apply the *Diaz* factors to these
 11 circumstances, dismissal would be proper. *First*, it is unlikely that any putative class
 12 members have relied on the action to protect their interests given that the case is in its
 13 infancy and there are no circumstances suggesting reliance on Plaintiff’s claims. This
 14 action has not been publicized in any way and as such, the putative class members are
 15 highly unlikely to have knowledge of it, or to have relied upon it in any way. Similarly,
 16 Plaintiff’s counsel is unaware of any other circumstances that may have led to the
 17 putative class’s knowledge of, or reliance upon, this action. *Second*, only four months
 18 have passed since the filing of the First Amended Complaint (“FAC”) filed on
 19 September 20, 2022, and the FAC does not mention any rapidly approaching statute of
 20 limitations. *See* Dkt. 12 (FAC). Plaintiff’s earliest interaction with the chat feature on
 21 Defendant’s website was in July 2022 and as such, based on the one-year statute of
 22 limitations associated with her cause of action, the statute of limitations shall not run
 23 until July 2023. As such, the rights of the putative class are preserved by the solely
 24 individual dismissal of Plaintiff’s claims with prejudice. *Third*, as discussed above,
 25 there is no settlement or concession of putative class interests given that there has been
 26 no settlement or compromise of any kind related to any potential class claims asserted
 27 in the FAC. Indeed, the resolution reached between the Parties does not address, affect,
 28

1 or change the putative class's rights or claims in any manner. Even under *Diaz*,
2 dismissal is clearly proper here.

3 The parties have diligently followed the rules to obtain a voluntary dismissal
4 prior to any substantive response to the Complaint. *Diaz* should not stand as a barrier
5 to dismissal, given the subsequent amendments to Rule 23(e) and the facts of this case
6 in which there is no settlement or compromise of any class claims, no collusion, and no
7 potential prejudice to any putative class member. Moreover, the dismissal as to any
8 putative class members would be *without prejudice*.

9 For all the foregoing reasons, the Plaintiff respectfully requests that the Court
10 enter a dismissal of this action with prejudice as to the named Plaintiff and *without*
11 *prejudice* as to the putative class.

12 Respectfully submitted,

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14 Dated: January 20, 2023

PACIFIC TRIAL ATTORNEYS, APC

15 By: /s/ Scott J. Ferrell

16 Scott. J. Ferrell
17 Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2023, I electronically filed the foregoing **RESPONSE TO ORDER NOTIFYING PLAINTIFF OF THE COURT'S EXPECTATIONS FOR DIMISSION AND NOTICE OF DISMISSAL WITH PREJUDICE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1)(A)(i)** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing via electronic mail to all counsel of record.

/s/ Scott J. Ferrell
Scott J. Ferrell